PETITION FOR WRIT OF CERTIORARI

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No.....

In the Supreme Court of the United States

OCTOBER TERM, 1940

ALASKA STEAMSHIP COMPANY, a corporation, Owner of the American Steamship DENALI,

Petitioner,

vs.

PACIFIC COAST COAL COMPANY, a corporation, *et al.*, and UNITED STATES OF AMERICA,

Respondents.

Petition for Writ of Certiorari

to the United States Circuit Court of Appeals for the Ninth Circuit.

MAY IT PLEASE THE COURT:

The petition of Alaska Steamship Company, a corporation, respectfully shows to this Honorable Court:

STATEMENT OF THE MATTER INVOLVED.

The steamer DENALI, owned and operated by petitioner as a common carrier in the Alaska trade and

having on board cargo owned by respondents, sailed from Seattle on May 16, 1935 at 5:43 A. M. On May 19, 1935 at 2:44 A. M., due to faulty navigation of her pilot, she stranded on a reef off Zayas Island in Caamano Passage and together with her cargo became a total loss. A petition was filed in the District Court by petitioner seeking exoneration from liability[1] or in the alternative limitation of liability[2] for cargo claims in excess of $360,000.00, resulting in a decision (R. 5462) and findings that petitioner was entitled to both exoneration and limitation (R. 5447) and a final decree dismissing the claims and exempting and discharging petitioner from liability (R. 5482). On appeal the Circuit Court of Appeals reversed the decree and denied both exoneration and limitation (R. 5608), Mathews, J., dissenting and holding that petitioner was entitled to limitation (R. 5625), and on rehearing the same result followed (R. 5632, 5651).

The District Court, as a basis for granting exoneration, found that petitioner had exercised due diligence to make the DENALI seaworthy, and further that she was in fact seaworthy at the commencement of the voyage (R. 5450), and that the sole cause of the stranding was faults or errors in navigation (R. 5460); and as a basis for limitation found that petitioner was without privity or knowledge thereof (R. 5460).

Respondents in opposition to the claimed right to exoneration and limitation, unsuccessfully urged in

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[1] §3, Harter Act, Title 46 U. S. C., §192, App. II.

[2] Title 46 U. S. C., §183, App. III.

both courts that the DENALI was unseaworthy because of allegedly defective compasses and insufficient charts causatively contributing to the stranding (R. 5609). Respondents further urged that the DENALI was navigated in violation of the provisions of sec. 2 of the "three-watch" statute[3] in that her three mates were not divided into three equal watches of not to exceed 8 hours each day.[4]

The DENALI had a complement of licensed deck officers consisting of a master and three mates, as required by the statute and her certificate of inspection. In addition, and as a precautionary measure, she had an experienced pilot, being also a licensed master, who although not required by the statute was permitted by her certificate of inspection. The watches of these officers were so assigned as to provide two navigating officers at all times during the hours of darkness between 4:00 P. M. and 8:00 A. M.[5] and at the time of the stranding both the pilot and third mate were on watch, although only the latter was required by the statute.

The District Court held that the statute had not been violated, but if violated, found that the DENALI was nevertheless seaworthy (R. 5450, 5457). The Circuit Court of Appeals sustained respondents' contention that the statute had been violated, holding that the statute limited the navigating duties of the three mates

[3] "* * * such vessel * * * shall have in her service and on board three licensed mates, who shall stand in three watches while such vessel is being navigated * * *." Sec. 2 of the Act of May 11, 1918 (40 Stat. 549; Title 46 U. S. C., §223; App. III).

[4] Assignments Nos. 1, 2, 3, 8, 9, 12; R. 5512, 5513, 5515, 5516.

[5] Schedule, App. I.

to 8 hours a day served in periods of not exceeding 4 hours each (R. 5613).

The three mates on the DENALI were divided into watches by the master,[6] the second and third mates serving 8 hours navigating duty each day in periods of 6 hours and 2 hours each (R. 5477, Schedule App. I), the third mate serving 6 hours from 12:00 Midnight to 6:00 A. M. and 2 hours from 4:00 P. M. to 6:00 P. M. daily.[7] The first mate not only relieved the Master on his watches, but regularly did likewise with the pilot for short intervals (R. 1555, 2144, 2181); on the day of sailing he stood no regular navigating watch, being engaged in duties incidental to loading, but did relieve the master between 6:00 P. M. and 12:00 Midnight (R. 1613); on May 17 he stood a 4 hour watch alternating with the second and third mates and a 4 hour watch with the second mate;[8] on May 18 he stood a 4 hour watch alternating with the second and third mates (R. 2181). The pilot, whose hours of duty are properly governed by the 12 hour maximum fixed by sec. 3 of the statute[9] stood watch 12 hours a day in two periods of 6 hours each (12:00 Midnight to 6:00 A. M.; 12:00 Noon to 6:00 P. M.).

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[6] It is the master's duty to select and station his crew. *Butler v. Boston Steamship Co.*, 130 U. S. 527, 554 (1889).

[7] R. 1607, 1608, 1610, 1612, 1836, 2179, 2216, 2323, 2338, 2339, 2412, 2413. The conclusion of the Circuit Court of Appeals that the third mate exceeded 8 hours watch duty is unsupported by the evidence.

[8] R. 1609, 2131, 2132, 2140, 2145, 2159, 2161, 2162, 2181, 2182.

[9] " * * * no licensed officer * * * shall be required to do duty * * * more than twelve hours of any twenty-four at sea * * *." Sec. 3, Act of May 11, 1918 (40 Stat. 549; Title 46 U. S. C., §235; App. IV).

The Circuit Court of Appeals held that the first mate failed to stand a navigating watch in compliance with the statute and arbitrarily held that therefore the pilot must be considered as a substitute for the first mate and as he stood a navigating watch in excess of 8 hours a day, he was standing watch in violation of the statute.

Sec. 2 of the statute relative to division of watches must, however, be applied only to the three mates, whereas the pilot is governed only by the maximum 12 hour provision of sec. 3 of the statute. There is nothing in the statute to support the holding that the watches must be served in periods not exceeding 4 hours each. The watch of paramount importance here is that in which the DENALI stranded. Assuming a violation of the statute by the manner in which the first mate stood his watches, there was no violation as to the pilot and third mate, and no possible causal connection between that violation and the stranding.

It therefore follows that in the watch of paramount importance two navigating officers were on duty, whereas only one was required by statute. If only the third mate had been on watch at the time of stranding there would have been no factual basis for the decision of the Circuit Court of Appeals. Because of the presence of the pilot, employed by petitioner as an added precaution, it has been erroneously found that the DENALI at the time of the stranding was being navigated in violation of the statute.

On the issue of exoneration the Circuit Court of Appeals held that a violation of the statute, without more, rendered the DENALI unseaworthy and being a customary violation, defeated the claim to exoneration from liability (R. 5624, 5625).

On the issue of limitation the Circuit Court of Appeals found that the stranding resulted from a "fault of navigation" (R. 5618) of which, of course, petitioner was without privity or knowledge, but found that petitioner had privity and knowledge of the violation of the statute by reason of the customary violation thereof, and the majority (the District Judge and one Circuit Judge opposed) further held that therefore limitation must be denied because petitioner had failed to show that the violation "*could not* have contributed to the stranding" (R. 5618). The imposition of this *extraordinary burden* of proof resulted from the misapplication by the majority of the so-called Pennsylvania rule. [10] Mathews, J., dissenting, held that the rule was inapplicable and that petitioner was only required to show by the ordinary burden of proof that the stranding occurred without its privity or knowledge and held that the evidence amply supported the District Court's finding that the sole cause of the stranding was due to faults or errors in navigation, of which petitioner was without privity or knowledge (R. 5629).

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[10] *The Pennsylvania*, 19 Wall. 125, 136 (1873), which in a collision case transfers the burden of persuasion on the issue of causation to the vessel violating a statutory rule to prevent collisions, requiring the offending vessel to prove that the violation *was not* a contributory cause.

On the rehearing, in referring to this finding the majority states:

> "These holdings as to the 'sole' cause and absence of privity were based upon the lower court's erroneous decision that the Act requiring the mates to stand three watches had not been violated. With regard to the finding that the wreck was caused by 'faults or errors' in navigation, this is not disturbed by a finding that the Act had been violated by the owner and hence imposed on the owner the presumption and burden of proof of The Pennsylvania, 19 Wall. 125, 136, that the violation could not have caused or contributed to the fault or error in navigation, which presumption the owner had not overcome. Our holding was that it had not been shown that the violation was not such a direct or such a *contributing* cause." (R. 5634).

Thus apparently overlooking the following in the decision of the District Court made a part of its findings:

> " * * * even if it can be successfully contended that the Section 2 scale for division of watches obligates shipowners and that the owner has in this instance violated that section (a contention with which this court does not agree), the evidence here is clear and convincing that the stranding was not in fact and could not have been caused or contributed to by duration or improper division of the mates' watches, and I so find. In that situation the owner has fully performed the strict requirement of the law relating to the amount or degree of proof as announced by the Circuit Court of Appeals for the Ninth Circuit in Chicago-Silverpalm, 1937 A. M. C. 1427, at 1436, and by the Supreme Court in Lie v. San Francisco, etc. S. S. Co., 243 U. S. 291, at page 298." (R. 5478.)
>
> " * * *

" * * * although only one watch officer was required by law or for safe navigation, two watch officers, to-wit, Pilot Obert and Third Mate Lawton, were on watch in the pilothouse of the Denali as navigating officers from about midnight of May 18-19 until the time said vessel stranded at about 2:44 A. M. of May 19, 1935; that neither of said watch and navigating officers was fatigued from excessive labor or lacking in sufficient sleep or rest at the time of the stranding or at any time during the said voyage, and that the said stranding was not in fact and could not have been caused or contributed to by any fatigue, excessive labor, or insufficient sleep of the watch officers, or either of them, and that said stranding was not in fact and could not have been caused or contributed to by the duration or actual division of the mates' or navigating officers' watches." (R. 5457.)

JURISDICTION.

The jurisdiction of this court is invoked under sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925; 43 Stat. 938, Title 28 U. S. C., §347(a).

The date of the judgment to be reviewed is June 30, 1939 (R. 5608, 5629, 5630). Within time allowed therefor by rule of court, and valid extension, a petition for rehearing was filed on August 29, 1939 and rehearing was granted by order entered on January 5, 1940 (R. 5631). The rehearing was finally disposed of after oral argument by opinion and dissenting opinion on rehearing entered and filed on June 7, 1940 (R. 5631, 5632, 5651).

QUESTIONS PRESENTED AND REASONS RELIED ON FOR ALLOWING THE WRIT.

1. The Circuit Court of Appeals has erroneously construed sec. 2 of the statute (§2 of the Act of May 11, 1918, App. III) to require a division of watches of the three mates so that the watch time of each mate will not exceed 8 hours a day, served in watch periods of not exceeding 4 hours each, and has erred in not limiting its application to the three mates and in applying the same to the pilot; and has erroneously construed sec. 3 of the statute (§3 of the Act of May 11, 1918, App. IV) by refusing to apply the same to the pilot; and has erroneously concluded that the third mate exceeded 8 hours watch duty a day.

The conclusion that the third mate exceeded 8 hours watch duty is wholly unsupported by the evidence. The erroneous application of sec. 2 of the statute to the pilot and the refusal to apply to him sec. 3 of the statute has resulted in an obvious miscarriage of justice by penalizing petitioner for employing and using an experienced pilot in addition to the required number of mates in the navigation of the DENALI, which should be corrected by this Court.

Although the statute (§§2 and 3 of the Act of May 11, 1918, App. III, IV) has been superseded insofar as the same is in conflict with the later statute establishing an 8 hour day for certain vessels,[11] the erroneous construction is likewise applicable to the later statute

[11] §2 of the Act of June 25, 1936, as amended; App. IV.

and would require service thereunder in watch periods of not exceeding 4 hours each, contrary to anything contained therein. This is an important question of maritime law which has not been, but should be settled by this Court.

2. The Circuit Court of Appeals has erroneously decided that a violation of the statute (§2 of the Act of May 11, 1918; App. III) or other manning statute, without more, renders a vessel unseaworthy and that where such violation is customary, exoneration under sec. 3 of the Harter Act must be denied (Title 46 U. S. C. §192; App. II).

In view of the increase in statutory requirements governing the operation of vessels, this is an important question of maritime law which has not been, but should be settled by this Court. The decision is in conflict with *Hartford & New York Transp. Co. v. Rogers & Hubbard Co.*, 47 F. (2d) 189, 191 (C. C. A. 2; 1931), and erroneously restricts the operation of sec. 3 of the Harter Act.

3. The Circuit Court of Appeals has erroneously decided that where there has been a customary violation of the statute (§2 of the Act of May 11, 1918; App. III) or other manning statute, then, without more, there must be a finding of privity and knowledge of such violation by petitioner.

In view of the increase in statutory requirements governing the operation of vessels, this is an important question of maritime law which has not been, but should be settled by this Court. The decision is in con-

flict with *The Virginia,* 264 F. 986 (1920), aff'd. in *Hines v. Butler,* 278 F. 877 (C. C. A. 4; 1921) and *LaBourgogne,* 210 U. S. 95, 122 (1908).

4. The majority of the Circuit Court of Appeals (the District Judge and one Circuit Judge opposed) has erroneously decided that where there has been a customary violation of the statute (§2 of the Act of May 11, 1918; App. III) or other manning statute, and a resulting finding of privity and knowledge of such violation therefrom, petitioner must, in addition to proving by the ordinary preponderance of the evidence that it was without privity or knowledge of the cause of the loss, in this case a fault or error in navigation, prove that such violation "*could not* have contributed to the stranding."

The decision of the majority results from a misapplication of the so-called Pennsylvania rule, being a procedural rule applicable only on the question of liability in a collision case. It transfers the burden of persuasion on the issue of causation to the vessel violating a statutory rule to prevent collisions by requiring the offending vessel to prove that the violation was not a contributory cause, failing which it is held liable, not because the violation was a contributory cause, but because it has failed to prove that it was not. The burden of persuasion is but the ordinary burden and is not the "extraordinary burden" requiring proof that the violation *could not* in the sense of could not by possibility, have been a contributory cause as applied by the majority.

This is not a collision case, nor is the question of liability at issue on the petition for limitation, thus making inappropriate the application of this procedural rule. The majority has erroneously applied the rule in a limitation case to add to the burden of petitioner to show that it was without privity or knowledge of the cause of the loss, thus in effect treating the rule as a presumption and giving the same weight as evidence.

The misinterpretation of the burden imposed under the rule and its extension and application in a non-collision case on the issue of the right to limitation of liability are questions of outstanding importance in the administration of the limitation statute, as well as the maritime law generally. Such application of the rule has been heretofore questioned,[12] and should be settled by this Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its Docket No. 8963, "Pacific Coast Coal Company, a corporation, et al., Claimants. Appellants, vs. Alaska Steamship Company, a corporation, Owner

[12] *Southern Pac. Co. v. United States*, 72 F. (2d) 212, 215 (C. C. A. 2; 1934), but see *New York Marine No. 10*, 109 F. (2d) 564 (C. C. A. 2; 1940).

of the American Steamship "DENALI," Appellee, and United States of America, Appellant, vs. Alaska Steamship Company, a corporation, Owner of the American Steamship "DENALI," Appellee," and that the said judgment of the United States Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

Respectfully submitted,

ALASKA STEAMSHIP COMPANY,
a corporation, Petitioner,

By LAWRENCE BOGLE,
CASSIUS E. GATES,
EDWARD G. DOBRIN,

Counsel for Petitioner.